July 20, 2004

PRECEDENTS CITED FOR H.R. 3313 ARE INAPPOSITE

In testimony before the House Judiciary Committee's Subcommittee on the Constitution on June 24, 2004, Phyllis Schlafly characterized a series federal statutes as precedents for H.R. 3313, which would bar the federal courts – including the Supreme Court – from hearing or deciding any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C or H.R. 3313 itself. At the request of a broad coalition of civil rights, religious, legal, and professional organizations, we have reviewed these federal statutes. As discussed below, reliance on these statutes as precedents for H.R. 3313 is unfounded.

1. Public Law 107-206, § 706(j), 116 Stat. 868 (2002)

Section 706 (116 Stat. 864) was an emergency measure enacted by Congress in the exercise of its Property Clause power (U.S. Const. art. IV, § 3, cl. 2) directing the Secretary of Agriculture to take immediate action to reduce the risk of fire and insect infestation on certain public lands. To enable the Secretary to carry out that mission unimpeded by statutory requirements that would otherwise apply, Section 706(j) exempted the actions to be taken under Section 706 from NEPA, the National Forest Management Act, the Appeals Reform Act, and any other applicable statutory requirements. Correspondingly, Section 706(j) provided that the Secretary's actions under the section "shall not be subject to judicial review by any court of the United States."

Providing that the Secretary's actions under Section 706 would not be subject to judicial review did not limit the "jurisdiction" of the federal courts; it simply reflected the fact that Section 706(j) had exempted the Secretary's actions from the statutory requirements for which judicial review would have been sought. Unlike H.R. 3313, moreover, Section 706(j) did not purport to bar federal court challenges to Section 706 itself. Indeed, Section 706 was challenged as unconstitutional and upheld as a valid exercise by Congress of its unlimited Property Clause power. *See Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1162 (10th Cir. 2004) (noting that the Supreme Court had "repeatedly observed that the power over the public land thus entrusted to Congress is without limitations.") (internal citation omitted).

2. Norris-LaGuardia Act of 1932 (29 U.S.C. § 104)

Congress enacted this statute to correct what it regarded as a misreading and misapplication by the federal courts of the Clayton Act in industrial conflicts. Congress believed that federal courts had misread the Clayton Act to authorize injunctions against certain peaceful union activities. Congress accordingly enacted the Norris-LaGuardia Act to make clear what activities could be enjoined and to impose

strict procedural requirements before injunctive relief may be entered as to activities that are unlawful. *See United States v. Hutcheson*, 312 U.S. 219, 235-37 (1941).

Mrs. Schlafly misreads the Supreme Court's decision in *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329-30 (1938), in which the Court upheld Section 7 of the Act. Section 7 prohibited district courts from entering injunctive relief in labor disputes without making certain findings of fact. It was *this* limitation that the Court stated was within "the power of Congress . . . to define and limit the jurisdiction of the courts." *Id*. at 330. The requirement that a court make certain factual findings before entering injunctive relief bears no resemblance to H.R. 3313.

3. Emergency Price Control Act of 1942 (56 Stat. 23)

This Act created an price-control system to prevent war-time inflation during World War II. Section 204 of the Act conferred on a special Emergency Court of Appeals, an Article III court, equity jurisdiction to restrain enforcement of price orders under the Act, and withdrew that equity jurisdiction from every other court. The Emergency Court's decisions were subject to Supreme Court review. The Supreme Court upheld this provision in *Lockerty v. Phillips*, 319 U.S. 182 (1943), stating that "[t]here is nothing in the Constitution that requires Congress to confer equity jurisdiction on any particular inferior federal court." *Id*. at 187. Moreover, discussing this provision in *Yakus v. United States*, 321 U.S. 414 (1944), the Court made clear that Congress, in the exercise of its power to define the jurisdiction of inferior courts, remains "subject to other constitutional limitations":

> Congress, through its power to define the jurisdiction of inferior federal courts and to create such courts for the exercise of the judicial power, could, *subject to other constitutional limitations*, create the Emergency Court of Appeals, give to it exclusive equity jurisdiction to determine the validity of price regulations prescribed by the Administrator, and foreclose any further or other consideration of the validity of a regulation as a defense to a prosecution for its violation.

Id. at 443 (emphasis added).

H.R. 3313 bears no resemblance to the Act. The Act does not bar access to an inferior federal court; it merely specifies that certain equitable relief may be sought only in a particular inferior court. Nor does the Act bar Supreme Court review of the special court's rulings, and the Act does not preclude a challenge to its own constitutionality. Finally, the Supreme Court, in discussing the Act, has made clear that Congress's power under Article III to define the jurisdiction of inferior federal courts is subject to other constitutional limitations.

4. Portal-to-Portal Pay Act of 1947 (29 U.S.C. § 252(d))

This Act extinguished back-pay claims arising from several Supreme Court interpretations of the Fair Labor Standards Act and, in section 2, provided that no federal court should have jurisdiction to enforce such claims. Once again, the limitation on "jurisdiction" was simply an incident of a redefinition of statutory rights. *See Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 64 (4th Cir. 1948) ("What was taken away was the right to recover on claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours of work in interstate commerce."). In upholding section 2, moreover, the U.S. Court of Appeals for the Second Circuit rejected the view expressed by some district courts sustaining section 2 "that since jurisdiction of federal courts other than the Supreme Court is conferred by Congress, it may at the will of Congress be taken away in whole or in part." *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1949). Echoing *Yakus* – emphasized that Congress's power in this regard was subject to other constitutional limitations. *Id*.

5. Johnson Act (28 U.S.C. § 1342)

This Act "deprived federal district courts of jurisdiction to enjoin enforcement of certain state administrative orders affecting public utility rates where 'A plain, speedy and efficient remedy may be had in the courts of such State,'" *Ala. Pub. Serv. Comm'n vv. Southern Ry. Co.*, 341 U.S. 341, 350 (1951), and "the jurisdiction of the federal court was based solely on diversity." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 534 (1981). "The legislative history of the Johnson Act ... makes clear that its purpose was to prevent public utilities from going to federal district court to challenge state administrative orders or avoid state administrative and judicial proceedings." *California v. Grace Brethren Church*, 457 U.S. 393, 410 (1982). The Act did not purport to prevent the Supreme Court from reviewing state-court rate order decisions, or to preclude a challenge to the constitutionality of the Act itself.

6. Medicare Act of 1965 (42 U.S.C. § 1395w-4(i)(1))

This provision precludes judicial review of certain Medicare payment calculations at the heart of a federal agency's expertise. As one federal Court of Appeals has stated:

> In enacting the "no review" provision and prohibiting review of the Secretary's calculation of the conversion factor, we find no indication that Congress intended to infringe upon the powers of the judiciary and prohibit review of substantial constitutional issues. To the contrary, we conclude *Congress simply intended to prevent judicial "second-guessing" of a discretionary administrative decision that is based substantially upon economic projections and cost analyses*. Moreover, because plaintiff has not presented any constitutional challenges to the Secretary's computation of the 1992 conversion factor, and because we have reviewed and rejected his constitutional challenges to the

> Medicare Act's "no review" provision, we conclude the separation of powers doctrine actually weighs against, rather than in favor of, judicial review of plaintiff's claim.

Painter v. Shalala, 97 F.3d 1351, 1359 (10th Cir. 1996) (emphasis). This provision has also been interpreted *not* to preclude judicial review of "substantial constitutional issues." *Am. Soc'y of Cataract and Refractive Surgery v. Thompson* 279 F.3d 447, 456 (7th Cir. 2002). H.R. 3313, of course, bars federal court review of constitutional claims, not discretionary agency actions.

7. Voting Rights Act of 1965 (42 U.S.C. § 1973)

This Act includes a provision specifying that states seeking termination of their special statutory coverage under the act must seek such relief from a three-judge District Court in the District of Columbia. Like the Court of Emergency Appeals upheld in *Yakus* and *Lockerty*, this provision simply specifies a particular Article III court in which a certain claim is to be presented. The Supreme Court held that "Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to 'ordain and establish' inferior federal tribunals." *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966).

8. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. §§ 1225(b), 1226(e), 1252)

This Act purported to limit the power of federal courts to review individual illegal alien removal and detention orders issued by the U.S. Attorney General and to hear claims regarding the Attorney General's decision to prosecute an alien. The Supreme Court has held that provisions of the Act denying or limiting judicial review of various actions by immigration officials do not prohibit judicial review of constitutional claims. *See Demore v. Hyung Joon Kim*, 538 U.S. 510, 517 (2003); *see also Ins. v. St. Cyr*, 533 U.S. 289, 298-306 (2001) (holding that certain provisions of the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Responsibility Act of 1996 do *not* strip federal courts of jurisdiction to review an alien's habeas corpus claim, and stating that "[a] construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."); *Hatami v. Ridge*, 270 F. Supp. 2d 763, 767-68 (E.D. Va. 2003) (stating that even though the Act withdraws federal jurisdiction over certain administrative decisions regarding removal and prosecution of aliens, courts can still hear an alien's habeas corpus claim); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (stating that a provision limiting judicial review in the deportation context "was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion."). The Supreme Court has refused to construe the Act as denying judicial

review of various actions by immigration officials on the ground that the construction would raise "a serious constitutional problem." *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (stating that the Supreme Court has suggested that "the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights.") (internal citations omitted).